

SERVED: April 21, 1994

NTSB Order No. EA-4141

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of April, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-12777 and
v.)	SE-12778
)	
STEVEN S. FUTYMA,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Chief Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held in these consolidated cases on October 20, 1992.¹ In that decision, the law judge affirmed an emergency order suspending respondent's

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

private pilot certificate until such time as he complied with the Administrator's request that respondent undergo a re-examination of his qualifications to hold his pilot certificate, and an additional order suspending respondent's pilot certificate for 90 days based on his alleged violations of 14 C.F.R. 91.129(b) and (h), 91.13(a), and 61.56(b).² For the reasons discussed below,

² **§ 91.129 Operation at airports with operating control towers.**

* * *

(b) *Communications with control towers operated by the United States.* No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, the pilot in command may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, visual contact with the tower is maintained, and a clearance to land is received. If the aircraft radio fails while in flight under IFR, the pilot must comply with 91.185.

* * *

(h) *Clearances required.* No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC.

* * *

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * *

§ 61.56 Flight review.

(b) No person may act as pilot-in-command of an aircraft . . . unless that person has [within the previous 24 months]--

(1) Accomplished a flight review given in an aircraft for which that pilot is rated by an appropriately rated instructor certificated under this part or other person designated by the Administrator; and

(2) A logbook endorsed by the person who gave the review

we deny respondent's appeal and affirm the initial decision.³

Both of the Administrator's orders stem from a flight respondent made in his Cessna 172 the morning of June 3, 1992, from Tanner-Hiller Airport, Massachusetts, to Westover Air Force Base, Massachusetts. Respondent does not deny that he violated sections 91.129(b) and (h) by entering the Westover air traffic area⁴ without establishing radio contact with the air traffic control (ATC) tower, and by landing, on the military side of the combination military/civilian airport, without an ATC clearance.

He maintains, however, that his actions in this regard were compelled by an emergency situation, and should therefore be excused under the "emergency defense" embodied in 14 C.F.R.

91.3.⁵ Specifically, respondent claims that an emergency existed
(..continued)

certifying that the pilot has satisfactorily accomplished the flight review.

* * *

³ The Administrator has moved to strike several documents attached to respondent's appeal brief, and an additional appeal brief filed by respondent in response to the Administrator's reply brief. Inasmuch as respondent has failed to justify our consideration of any new evidence not already in the record, or to show good cause for an additional brief in this case, the Administrator's motions to strike are granted.

⁴ At the time of this incident, an airport traffic area was defined as all the airspace, up to 3,000 feet above the surface, within a five-mile radius of the center of an airport with an operating control tower. 14 C.F.R. 1.1 (1993).

⁵ Section 91.3(b) states:

(b) In an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency.

in that he was dangerously low on fuel,⁶ his radios were inoperable, and he was suffering from "pathological stress."

The record reveals that, after a futile two and a half hour wait for fuel at Tanner-Hiller, respondent grew impatient and took off from that airport without refueling his aircraft, and began an apparently random flight in search of fuel. Over the next approximately 30 minutes respondent flew over three uncontrolled airports and sought information regarding the availability of fuel at each one by broadcasting his request for fuel over the Unicom frequency.⁷ Respondent conceded that he had access during the flight to a sectional navigation chart of the area and an airport facility directory, both of which clearly indicated the availability of fuel at each of the three airports he had passed over. Respondent claimed that he did not consult these documents because of stress.

When respondent received no response over the Unicom frequency, respondent's stress level -- which he testified had been extremely high from the moment he took off from Tanner-

⁶ Respondent's assertions on this point are inconsistent. At some points during the hearing respondent suggested that if he had not landed immediately at Westover he would have crashed due to fuel exhaustion. At other points, and in his brief, respondent seems to concede that he knew he had 10 gallons of usable fuel remaining at the time he landed at Westover, but suggests that he was not willing to operate an aircraft which did not have the 30-minute reserve required by section 91.151.

⁷ Unicom is a nongovernment air/ground radio communication station which may provide airport information at public use airports where there is no control tower or Flight Service Station. Respondent testified that he was aware he might not get a response over the Unicom frequency.

Hiller, due to his perceived low fuel situation -- increased further. He testified that, fearing a faulty circuit, he ran his fingers over the fuses on his control panel and, in retrospect, concluded that he must have inadvertently pushed down the master switch and cut off all power from the aircraft's battery. Consequently, according to respondent, he unwittingly rendered his radios inoperable. Respondent alternatively suggests -- but does not fully develop this theory in the record -- that his radios were malfunctioning due to a defective solenoid, which he replaced two months later.

Respondent claims that even after he inadvertently turned off his battery power he continued to attempt to make radio contact over 121.5 (the emergency frequency) and tuned his transponder to 7700 (the emergency code), but received no answer.

When he saw the runways at Westover, he decided he had no choice but to land there. Respondent testified that he did not ascertain or attempt to use the ATC tower frequency because he was experiencing an emergency and "was not prepared for that." (Tr. 267-8.)

In desperation, respondent landed at Westover.⁸ Upon landing, he was questioned by ATC and Air Force personnel about the reasons for his unauthorized landing. Respondent told them that he was low on fuel but did not mention that he had

⁸ Although respondent testified that he circled the airport twice, control tower personnel indicated that respondent did not circle before landing.

experienced radio problems, even after being counseled by the tower manager as to the importance of radio communications during an emergency. After restarting his aircraft and turning on the master switch, respondent's radios were fully operational. Indeed, tape recordings introduced into evidence show that he had normal radio communications with ATC during his taxi to the civilian side of the airport for refueling, and during his subsequent takeoff from Westover.

In light of the amount of fuel it took to "top off" respondent's fuel tanks at Westover (27.7 gallons), and the total usable fuel capacity of respondent's aircraft (38 gallons), the Administrator's expert witness concluded that respondent had 10.3 gallons of usable fuel when he landed at Westover. He further concluded, based on rates of fuel consumption listed in the relevant aircraft performance charts, that this was enough fuel for respondent to continue flying for at least another hour and 15 minutes. Accordingly, it is clear that, contrary to respondent's belief, he was not dangerously low on fuel when he made his "emergency" landing at Westover.

As part of his investigation into this incident, the FAA inspector asked respondent to furnish evidence of his most recent biennial flight review prior to the incident. Respondent sent him a copy of a logbook page containing a stamped entry indicating that a biennial flight review had been satisfactorily completed. However, the writing which appeared in the "Name" and "Certif #" blanks was so smeared that it was impossible to

decipher. The "Date" block was also smeared but appeared to indicate a date of "8/10/90." When asked for more information, respondent claimed he could not remember the name of the instructor or even where he had taken the flight review.⁹ Because the inspector was unable to verify from the information provided by respondent whether he had actually undergone the required biennial flight review, respondent was charged with a violation of section 61.56(b).

In addition, the inspector concluded that respondent's conduct on the flight in question required that his qualifications to hold a private pilot certificate be re-examined, with an emphasis on preflight preparation, airport and traffic pattern operations, and cross-country flying. Specifically, the inspector was concerned because respondent had apparently failed to ascertain how much fuel he had on board before taking off from Tanner-Hiller; had not properly used the information available to him on the sectional chart and the airport facility directory; had apparently misunderstood the purpose of the Unicom frequency; and had failed to make the required radio contact with the Westover control tower before landing. Respondent refused the re-examination request, and the emergency order of suspension followed.

Violations of sections 91.129(b) and (h), 91.13(a), and 61.56(b).

⁹ Respondent, who apparently lives in Vermont and works in New York, stated that he might have taken the August 1990 biennial in Merritt Island, Florida, but was unsure even of that.

As noted above, respondent argues that his unauthorized entry into the air traffic area and his unauthorized landing at Westover should be excused because he was experiencing an emergency. The law judge was apparently unpersuaded, however, as are we, that any legitimate emergency existed. Contrary to respondent's belief, he was not dangerously low on fuel. Moreover, as respondent himself emphasizes, his radios were inoperable because he inadvertently turned off the master switch. Accordingly, any resulting emergency was due solely to his own negligence, and cannot serve as an excuse for his violations. It is well-established that violations cannot be excused by an emergency of the airman's own making. See Administrator v. Worth, NTSB Order No. EA-3595 at 6-7 (1992). Similarly, respondent's incorrect belief that he was low on fuel, which in turn led to his high stress level, are factors that he could have avoided by proper pre-flight planning.

Moreover, even if respondent's loss of his radios could be considered a legitimate emergency, section 91.3 would not excuse his violations in this case because that section only permits deviations from the regulations "to the extent required to meet th[e] emergency." As noted above, respondent had more than enough fuel to continue flying to any of the nearby uncontrolled airports, where he could lawfully have landed without radios. See Administrator v. Freeman, NTSB Order No. EA-3793 at 10-11 (1993) (section 91.3 requires a causal connection between the

perceived emergency and the violation).¹⁰

Regarding respondent's alleged lack of a biennial flight review, we believe that the illegibility of the logbook entry proffered by respondent, coupled with his inability to remember any helpful information which would enable the FAA to verify that respondent had indeed complied with the requirements of section 61.56(b), is sufficient prima facie evidence of noncompliance with that section which remains unrebutted in this record.¹¹ While respondent asserts that the illegibility was caused by water damage after he left his briefcase in the rain, this proffered explanation does little to establish that a biennial flight review actually occurred.

In sum, we agree with the law judge that the Administrator successfully established violations of each of the cited regulations, and we uphold his affirmance of the order suspending respondent's pilot certificate for 90 days.¹²

¹⁰ This rationale would hold equally true if respondent's radio problem was caused by a faulty solenoid, as respondent alluded at the hearing and in his brief.

¹¹ Because the pilot, rather than the FAA, will have easier access to information pertaining to an alleged flight review including, in most cases, memory of the event, we see no unfairness in placing the burden on the pilot to produce, in response to a proper request by the Administrator, verifiable evidence of compliance with section 61.56(b).

¹² Even if respondent's complaints regarding the adequacy of the FAA's investigation in this case and the controller's failure to give him a "green light" (effectively clearing him to land) at Westover were valid, which on this record they do not appear to be, this would in no way excuse his violations in this case.

The re-examination request.

Section 609(a) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1429(a)), states that "[t]he Administrator may, from time to time, . . . reexamine any civil airman." If a pilot refuses to be re-examined, the Administrator may suspend the pilot's certificate until such time as he or she complies with the re-examination request. We will affirm such an order of suspension so long as the Administrator's request was reasonable.

See Administrator v. Reinhold, NTSB Order No. EA-3973 5-6 (1993) and cases cited therein (Administrator need only show that a reasonable basis exists to question the certificate holder's competence). The record in this case amply supports the Administrator's re-examination request.

The circumstances surrounding respondent's flight on June 3, 1992 -- his incorrect belief that he was low on fuel; his handling of that perceived low-fuel situation, particularly his decision to bypass several uncontrolled airports before landing at Westover without any contact or clearance from the control tower there; and his failure to consult available resources -- raised substantial questions as to respondent's competence in those areas. Accordingly, the Administrator's re-examination request was reasonable, and the law judge properly affirmed the emergency order of suspension.¹³

¹³ We find no merit to respondent's assertions in his notice of appeal that the law judge lacked objectivity, that he discriminated against respondent because of his age, or that he

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed;
3. The emergency order suspending respondent's pilot certificate pending successful completion of a re-examination is affirmed;
and
4. The order suspending respondent's pilot certificate for 90 days is affirmed.¹⁴

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

(..continued)

improperly cut respondent off during the hearing. Although the law judge found it necessary, on many occasions, to explain to respondent the purpose of various stages of the hearing and to limit respondent's presentation of extraneous, irrelevant, and repetitious material, we find no error in the law judge's conduct of the hearing. To the contrary, the record indicates that the law judge gave respondent a fair and impartial hearing, and exhibited extraordinary patience with respondent.

¹⁴ The record indicates that respondent has already surrendered his certificate to the Administrator.

At the Administrator's request, the law judge stated that imposition of the 90-day suspension could be deferred until after resolution of the pending re-examination request (assuming respondent successfully completes the re-examination). We agree that this arrangement would be most consistent with the underlying purposes of both orders.